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VIII.—*Some Contributions to Canadian Constitutional History.*

I. THE CONSTITUTION OF THE LEGISLATIVE COUNCIL OF NOVA SCOTIA.

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(Read May 20th, 1896.)

I. INTRODUCTION.

I propose in this paper to give an historical review of the origin and development of the oldest legislative body of Canada, the Legislative Council or upper house of the legislature of the province of Nova Scotia, and to show the legal and constitutional conditions under which its members hold their offices. The subject is one of considerable interest and importance on account of the agitation that has been going on for some years in the province for the abolition of this branch of the legislative power, and of the differences of opinion that have arisen as to the exact nature of the tenure of the office of councillor and its rights and privileges under the commission from the Crown.

II. CESSION OF NOVA SCOTIA TO ENGLAND.

By the twelfth article of the Treaty of Utrecht,[1] which was signed by France in 1713, she ceded to England the province of Nova Scotia, which had been previously known as a portion of the ill-defined French dominion of Acadie. From that day to this Nova Scotia has remained a province of the British Empire. The island of Cape Breton did not, however, become a possession of England in 1713. It finally became an English colony by the Treaty of Paris in 1763,[2] when all the countries that now form the Dominion of Canada were formally transferred to England.

III. GOVERNMENT, 1713-1749.

For a few years the Government of Nova Scotia was vested solely in a governor, who had command of the garrison stationed at the fort of Annapolis, known as Port Royal in the days of the French regime.[3] In 1719 a commission was issued to Governor Phillips, who was authorized to appoint a council of not less than twelve persons, all of whom held office during pleasure. As there were few English families in the province and French Acadians were the sole inhabitants of the cultivated

[1] Houston's "Constitutional Documents," p. 4.
[2] See Houston, p. 61.
[3] Murdoch's "History of Nova Scotia," I., p. 356-363.

tracts, the council at first was composed almost exclusively of the officers of the garrison and public officials. The governor, in his instructions,[1] was ordered "neither to augment nor diminish the number of the said council, nor suspend any of the members thereof, without good and sufficient cause," which he was required "to signify to his Majesty and to his Commissioner of Trade and Plantations," who then had the administration of colonial affairs. In case of the absence of any one of them for twelve months without leave from the governor, or for two years without his Majesty's leave, their places were to be vacated. They were also to be suspended in case of wilful absence from their official duties. In the absence of the governor or lieutenant-governor, the eldest councillor was directed to act as president of the council. This council had advisory and judicial functions, but its legislative authority was of a very limited scope. Their acts did not go beyond temporary regulations relative to trade in grain in the Bay of Fundy, or else local rules touching the people of the village of Annapolis. To preserve some form of government in the Acadian settlements, where the people had no acquaintance with English laws and customs, they were required to choose annually, in their several parishes, several deputies to act in their behalf, and to publish the orders of the governor. These deputies were authorized to act as arbitrators in small matters of controversy between the French Acadians, and from their decision an appeal was allowed to the governor-in-council, who sat for this purpose three times a year.[2]

IV. Foundation of Halifax and Establishment of New Civil Government.

This system of government—merely provisional—lasted until 1749, when the city of Halifax was founded, and the imperial government decided to give special attention to the English settlement of the province. Encouragement was given to officers and men who were retired from the army and navy, and who were desirous to settle with or without families, in the province. Halifax henceforth became the seat of the new civil government.[3] "For the better administration of justice and the management of the affairs of the said province," Governor Cornwallis, by his commission and instructions, had "full power and authority to choose, nominate and appoint such fitting and discreet persons as you shall either find there [in the province] or carry along with you, not exceeding the number of 12, to be of our council in our said province." All members of the council held office during pleasure. The governor had full power "to suspend any of the members from sitting, voting and assisting" in the

[1] Canada Sessional Papers, 1883, No. 70.
[2] Haliburton's "History of Nova Scotia," I., 96.
[3] Selections from Nova Scotia Documents (Akins), 495.

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council if he should "find just cause for so doing."[1] In case there should be less than nine councillors residing in the province the governor was to have full power to choose "as many persons as will make up the full number of our said council to be nine and no more."[2] The governor had also "full power and authority, with the advice and consent of our said council from time to time, as need shall require, to summon and call general assemblys of the Freeholders and Planters within your government, according to the usage of the rest of our colonies and plantations in America." And the governor was "with the advice and consent of our said council and assembly or the major part of them respectively to have full power and authority to make, constitute and ordain laws, statutes, and ordinances for the public peace, welfare and good government of our said province,—said laws, statutes and ordinances not to be repugnant, but as near as may be agreeable to the laws and statutes of this our Kingdom of Great Britain." The governor had "a negative voice in the passing of all laws, statutes and ordinances." All such laws were subject to disallowance by the imperial government.

V. The Council from 1749-1758.

This council exercised legislative as well as executive functions, and in conjunction with the governor carried on the government of the province without the assistance of an assembly until 1758. During these nine years the council was called upon "to make as few laws and ordinances as possible, and to pass merely such acts as were necessary for the preservation of the peace and the good order of the colony until the inhabitants should be sufficiently numerous to elect their own representatives."[2] The council, however, found it necessary to pass a number of laws, some of which imposed duties on trade to raise a revenue. The legality of their powers to pass such legislation was questioned by Chief Justice Belcher, and when the matter was referred to the law officers of the Crown of England, they gave the opinion "that the governor and council alone are not authorized by His Majesty to make laws. Till there can be an assembly His Majesty has ordered[3] the government of the infant colony to be pursuant to his commission and instructions, and such further directions as he should give, under his sign manual, or by order-in-council."[4]

VI. Summoning an Assembly.[5]

The result of this decision was the establishment of a representative assembly in 1758 on a plan matured by the governor-in-council and

[1] See Nova Scotia Documents for copy of commission, etc.
[2] Haliburton's "History of Nova Scotia," I., 163.
See *above*, paragraph iv.
[4] See N. S. Documents for all papers relating to the calling of an assembly.
[5] See N. S. Documents, 718 *et seq.*

approved by the Lords of the Board of Trade, who were still at the head of colonial affairs. The first house of assembly of Nova Scotia, consisting of 22 members, met at Halifax on the 2nd of October, 1758, and duly organized by the election of a Speaker and the formalities necessary on such occasions by law and usage.

VII. Commencement of a new era in the Constitutional History of Nova Scotia.

Consequently the year 1758 is the commencement of a new epoch in the constitutional history of Nova Scotia. We find then from that time a civil government duly organized as in the other English colonies of America, generally known as provincial governments. We find (1) a governor the head of the executive authority and a branch of the legislature, having a negative or affirmative voice in all legislation, appointed by the King and acting under the royal commission and instructions. (2) A council, appointed during the pleasure of the Crown, to act as an advisory body and also as an upper house of the legislature. (3) A house of assembly elected by the inhabitants of the province in accordance with law. As in all the other colonies of the Crown of North America, these three branches, governor, council and assembly, passed such statutes and laws as were necessary for their internal regulation and were subject to the general control of the Queen-in-Council and the Parliament of Great Britain as the supreme executive and legislature of the whole British Empire.

VIII. Constitution of Nova Scotia, Whence Derived.

Previous to 1758 the Sovereign-in-Council exercised all powers of government through the exercise of the royal prerogative, as in the case of all ceded or conquered countries. The constitution of Nova Scotia has always been considered previous to 1867 as derived[1] from the terms of the royal commissions to the governors and lieutenant-governors, and from the instructions which accompanied the same, from imperial orders-in-council, from despatches from the imperial secretary of state conveying the will and wishes of the imperial government, from acts of the imperial parliament immediately applicable to the colony, and from acts of the local legislature approved by the Crown, and "the whole to some extent interpreted by uniform usage and custom in the colony."

IX. Importance of the Constitutional Change in 1758.

Previous to 1758 the governor and council, acting under royal instructions, were practically supreme in the exercise of the powers of local

[1] Lt.-Governor Archibald, Can. Sess. Papers, 1883, No. 70; Bourinot's "Manual of Constitutional Government of Canada," p. 97.

government. From that day, however, Nova Scotia was vested with large powers of self-government. It is a fundamental principle that although a sovereign has the right to legislate for a conquered country by virtue of his royal prerogative, yet he ceases to have that power after he has authorized and directed the summoning of a representative legislative assembly.[1] By granting an assembly to Nova Scotia in 1758, he precluded himself from legislating directly for the colony by virtue of his royal prerogative and irrevocably granted to the people the constitutional right of exercising all subordinate legislation over the province by an assembly with the consent of the governor and council. In this system of government the Crown continued to exercise large powers of control since it was represented in the province by a governor having the right to negative all acts of the two other branches, and having in addition the appointment and supervision of the men constituting the upper house of the legislative power. With all its inherent defects which were to show themselves in the course of the ensuing eighty years, the change in the system of government, however, was very much in advance of the previous condition of things. From that time forward, there was an organized constitution solemnly granted by the Crown for legislative purposes. A governor, legislative council and an elected assembly represented collectively a complete legislature.

X. Judicial Power of the Council.

The council also for many years in the history of the province, exercised in conjunction with the governor certain judicial powers as a court of appeal in civil cases, and also as a court of marriage and divorce.

XI. Constitution of the Council, 1758-1838.

It is not necessary for the purposes of this paper to go beyond the constitution of the council, or to deal with that of the assembly except when its proceedings may affect the former. Its members continued always to be appointed by the Crown during pleasure. The instructions that accompanied the commission of Governor Wilmot in 1764, illustrate the powers the governors possessed as respects the council as constituted with executive and legislative powers in these and later times. He was not "to suspend any of the members thereof without good and sufficient cause, nor without the consent of the majority of our said council, signalized in council after due examination of the charge against such councillor, and his answer thereunto; and in case of the suspension of any of them you are to cause your reasons for so doing, together with the charges and proofs against the said persons, and their answer thereto, to be duly entered upon the council books, and forthwith transmitted to

[1] Lord Mansfield in the Grenada case.

the commissioners for trade and plantations in order to be laid before us; nevertheless, if it should happen that you should have reasons for suspending any councillor not fit to be communicated to the council, you may in this case suspend such persons without their consent." But in the latter case, also, the reasons of such suspension must be communicated to the Crown in England. Provision was always made in the instructions for ensuring the attendance of members, and regulations made for freedom of debate and vote in all matters of public concern.

XII. The Agitation for a Change in the Constitution of the Council.

For nearly ninety years this system of government continued in force. Parliamentary government, in the modern sense of the term, never obtained, but the government of the country was virtually under the control of the council exercising executive, legislative and judicial powers. In the course of time a contest grew up between the irresponsible council and the people's house for the management of all the public taxes and finances, for the separation of the executive and legislative functions of the council, and "for the responsibility of the members of government to the assembly." As a remedy for existing grievances, an address to the Queen, passed by the house of assembly in 1837, prayed that "Her Majesty should grant an elective legislative council," or "should separate the executive from the legislative council;" provide "for a just representation of all the great interests of the province in both"; introduce into the executive "some members of the popular branch," and otherwise secure "responsibility to the Commons, and in that way confer upon the people of the province what they value above all other possessions, the blessings of the British constitution."[1]

XIII. Necessity for a Change in the Constitution of the Council.

Writing in 1829, Judge Haliburton[2] observes: "By making the members of the council independent of the governor for their existence (*for at present he has not only the power of nomination, but of suspension*) and investing them with no other powers than those necessary to a branch of the legislature much weight would be added to administration, on the confidence and extent of interest that it would thereby obtain, a much more perfect and political distribution of power would be given to the legislature, and the strange anomaly avoided of the same persons passing a law and then sitting in judgment on their own acts, and advising the governor to assent to it."

[1] See J. Howe's "Speeches and Letters," I., 139-142.
[2] History of Nova Scotia, II., 317.

XIV. Separation of the Executive and the Legislative Powers of the Council.

The result of the agitation was a separation of the executive and legislative powers of the council. An executive council was henceforth to be appointed as well as a legislative council, though it was in the power of the Crown to allow members of the former to sit in the latter—a power that has always been exercised to a greater or less extent. These changes were effected by the authority of the Crown alone. Members of both executive and legislative councils continued to hold their seats at the pleasure of the Crown.

XV. Responsible Government Established.

While large concessions were made to the demands of the popular party by the changes in the constitution of the council, by giving complete control to the people's representatives over the finances and taxes, and by increasing the responsibility of the executive councillors to the assembly, it took some years before the principles of ministerial responsibility were established on a firm and durable basis. Indeed it was not until 1848, when Lord Elgin became governor-general of all British North America that free parliamentary government can be said to be established beyond dispute.[1] No act of parliament was necessary to effect the important change that took place in the government of the province from 1838 to 1848. It was impossible indeed to reduce into the form of a positive enactment the constitutional principles—in other words the conventions, understandings and usages that underlie and make up responsible government. The governors received from time to time the instructions necessary to carry out the new system in all its entirety, as a result of Lord Durham's important mission to Canada.[2]

XVI. Tenure of the Office of Legislative Council since 1838.

The instructions in 1838 to the Earl of Durham, "governor in chief, in and over our province of Nova Scotia, or in his absence to the lieutenant-governor or officer administering the government of the said province" for the time being, provided for an executive council and a legislative council "hereafter to consist of such and so many members as shall for that purpose be nominated and appointed by us, under our royal sign manual and signet, or shall be provisionally appointed by you the said John George Earl of Durham, until our pleasure thereon shall be known." The number of executive councillors was not to exceed nine, and the number of legislative councillors residing in the province was not to ex-

[1] See Bourinot's "Manual of Constitutional History," p. 9.
[2] See next paragraph.

ceed fifteen. The clauses that appeared in the instructions to Governor Wilmot[1] and other governors, with respect to suspension and attendance of members were repeated. Executive and legislative councillors were, as always, to hold office during pleasure.

XVII. Commission and Instructions to Governor-General and Lieutenant-Governor.

It is well here to observe that during the early history of Nova Scotia, the commissions and instructions given to the various representatives of the Crown in the province gave them powers "as our captain-general and governor-in-chief in and over our province of Nova Scotia and the islands and territories thereunto belonging in America." These commissions appear to have ceased to be given after the constitutional act of 1791, which formed the two provinces of Upper and Lower Canada. The governor-general of Canada from that time was commissioned as "our captain-general and governor-in-chief in and over our province of Nova Scotia, or in his absence to our lieutenant-governor or officer administering the government of our said province for the time being."[2] Up to 1867 every commission to a lieutenant-governor contained these words: "In case of the death or during the absence of our captain-general and governor-in-chief of our said province of Nova Scotia, now and for the time being, we do hereby authorize and require you to exercise and perform all and singular, the powers and directions contained in our commission to our captain-general and governor-in-chief, according to such instructions as he hath already received from us, and such further orders and instructions as he or you shall hereafter receive from us." The commission and instructions, therefore, though in form addressed to the governor-general,—as in Lord Durham's case above—were really instructions to the lieutenant-governor, who in that case had all the powers and authorities which were conferred upon them.

XVIII. Effort of the Legislative Council in 1845 for Changes in its Constitution.

In 1845 the legislative council of Nova Scotia passed an address to Her Majesty complaining of certain difficulties that had arisen since the remodelling of the council on account of gentlemen residing in the rural districts being unwilling to accept the position of legislative councillor "either from the want of a defined constitution or of a pecuniary provision for the expense of the attendance of the country members." The address concluded with a prayer that the legislative council "might

[1] See *above*, paragraph xi.

[2] See Lt.-Governor Archibald's Memo., Leg. C. Jour., 1883, p. 100.

be established on such a basis as might be compatible with the right, efficient and independent discharge of its high and important duties." [1]

XIX. Answer of Lord Stanley to Address of 1845 for Change in the Constitution of Legislative Council of Nova Scotia.

The colonial secretary of the day, Lord Stanley—afterwards the Earl of Derby, premier of England—in a despatch to Lord Falkland, then lieutenant-governor, dated August 20th, 1845, assigned reasons why it was not possible to make pecuniary provision for the payment of the members, and then proceeded to discuss "the second proposal, that the tenure of office of a legislative councillor should be during his life, and not during His Majesty's pleasure." No such "second proposal" in exact words, it is well to note, was made in the address of the legislative council, as may be seen by reference to the preceding paragraph No. 17.[2] All that they asked for was a "defined constitution." Lieutenant-Governor Archibald,[3] discussing this matter in 1883, assumes with much reason that Lord Stanley must have been citing the language of Lord Falkland's despatch which accompanied the address of the legislative council, and which was probably in the nature of one of those confidential communications that are not made public except on special occasions. In this despatch[4] of Lord Stanley, he did not consider the argument deduced from the Canadian constitution in favour of a life term as at all meeting the case—and this argument was obviously in Lord Falkland's letter since it is not used in the address of the council. He pointed out that the tenure of the office of legislative councillor in Canada was "connected with and regulated by many other constitutional rules which are not in force in Nova Scotia, and of which the introduction into Nova Scotia might perhaps be found impossible." But though he thus "hesitated to admit one of the arguments urged in favour of this change," he added that he did not "design to be understood as opposed to the change itself." He then went on to refer to the fact that a question nearly connected with this, arose in New Brunswick[5] in 1843, and he had, on the 11th of July and 30th December, in that year, addressed to Sir W. Colebrooke, lieutenant-governor of that province, two despatches in which "he explained" the views of Her Majesty's government on the question which has arisen in Nova Scotia. In the first despatch of the 11th July, he states that "Her Majesty's government had humbly submitted to the Queen their opinion that it would be proper to revise the instruments by which the legislative council of New Brunswick is constituted." He had

[1] See Legislative Council Journal, 1845.
[2] See *above*, p. 148.
[3] See *below*, paragraph xxiii.
[4] See Legislative Council Journal, 1846, App. I.
[5] See *below*, paragraph xxvii.

observed that the government "had recommended, that in that revision the number of legislative councillors should be increased to 21; that of that number seven only should be persons holding offices at the pleasure of the Crown; and that the quorum should be fixed at 8." Lord Stanley had also informed the lieutenant-governor of New Brunswick that the government had "further advised Her Majesty that provision should be made for vacating the seats of members, either in the case of bankruptcy or insolvency, or in any case where a member should be a defaulter or should be convicted of any of the crimes which, in the technical sense of the word, are distinguished as infamous, and that to these rules we had proposed that another should be added for rendering void the seat of any member absenting himself, whether with or without leave, after the lapse of a certain prescribed period." In the later despatch of the 30th December, 1843, Lord Stanley had informed Sir W. Colebrooke that "on proceeding to execute the intention" set forth in the preceding paragraph, he had discovered that "it would be practicable to fulfil the pledges of the 11th of July, without incurring the inconvenience of introducing any change in the royal commission and standing instructions under which he was acting." These changes, continued Lord Stanley, in the despatch to Lord Falkland, were carried into effect. They were made, he pointed out "at the instance of the popular branch of the legislature and were suggested by that body with the apparent, or rather with the avowed design of rendering the legislative council more accessible to popular influences, and of bringing the two houses into a more habitual accord and harmony with each other." More than that, it appeared to Her Majesty's government that "the proposed changes would tend to elevate the character, and to increase the legitimate authority and influence of the legislative council and thus to give additional stability to the provincial constitution" of New Brunswick.

XX. Changes Proposed by Lord Stanley in Case of Nova Scotia.

"Adhering to that opinion," concluded Lord Stanley in his despatch of 20th of August, 1845, to Lord Falkland, "*we think that the same or similar rules ought to be introduced into Nova Scotia, as a necessary accompaniment of the proposed alteration in the tenure of the office of a legislative council. On these terms Your Lordship will understand that Her Majesty would be prepared to accede to the suggested change in that tenure.*"[1] As respects the suggestion, that "this innovation should be made by the authority of parliament," he was not aware of any "reason for doubting the power of the Queen to effect the change permanently, in the unaided exercise of Her Majesty's royal prerogative," and he should regard "as improper and unconstitutional, an application to par-

[1] The italics are the present writer's.

liament for that purpose." These conclusions respecting the changes in Nova Scotia were submitted by Lord Stanley to Her Majesty "who has been pleased to signify her sanction of them, and to command me to communicate it to the legislative council, as comprising in substance the answer which Her Majesty is pleased to return to their loyal and dutiful address."

XXI. Answer of Legislative Council of Nova Scotia to Lord Stanley's Despatch of 20th August, 1845.

This despatch of Lord Stanley "comprising in substance the answer of Her Majesty" to the address in question, was communicated in due form to the legislative council of Nova Scotia on the 13th January, 1846. The council considered the despatch and came to the following resolutions which were embodied in an address to the lieutenant-governor, with the request that they be "submitted to Her Majesty's government as the result of their deliberations upon the proposal contained in the said despatch:

"*Resolved*, That this house highly valuing the increased stability which Her Majesty has been pleased to confer upon the legislative council, and members of that body humbly express their thanks to Her Majesty for a measure so gratifying to them, and in their opinion so beneficial to the country.

"*Resolved*, That this house *concurs in the necessity and propriety of the conditions attached to the concession of a tenure for life to its members*,[1] viz.: That it shall consist ordinarily of twenty-one members,—that of that number seven only shall be persons holding office at the pleasure of the Crown—that if any member shall fail to give his attendance in the said legislative council without Her Majesty's permission, or that of the lieutenant-governor, for such number of sessions as may be fixed by Her Majesty's government, or shall become bankrupt or insolvent or make any general assignment of his effects for the benefit of his creditors, or take the benefit of any law relating to insolvent debtors, or become a public defaulter, or shall have committed, or shall commit, any treason or felony, or any crime technically denominated infamous, the seat of such legislative councillor shall thereby become vacant."

XXII. Despatch of Mr. Gladstone as Colonial Secretary on the same Subject.

These resolutions, which show clearly that the legislative council gratefully concurred in the changes sanctioned by the sovereign, were duly communicated by the lieutenant-governor to Mr. Gladstone, who had in the meantime become secretary of state for the colonial and war

[1] The italics are the present writer's.

department in the new government led by Lord John Russell, who had succeeded Sir Robert Peel. In Mr. Gladstone's answer[1] to Lord Falkland, under date of the 4th May, 1846, he commences by simply acknowledging the receipt of the despatch inclosing "certain resolutions adopted on the 19th March last, by the legislative council of Nova Scotia, expressive of their satisfaction at the changes which Her Majesty has been pleased to sanction in the constitution of that house." He then goes on to say that "provision had been made in the commission to Earl Cathcart, as governor of Nova Scotia, for increasing the number of members of the legislative council of that province from 15 to 21;" but it was not "deemed necessary to insert in the royal instructions the rule restricting the number of councillors holding office," but the lieutenant-governor was required in accordance with the intention of Mr. Gladstone's predecessor, Lord Stanley—as stated in his despatch of August 20th, given above—"to observe the practice which subsists in the neighbouring province of New Brunswick," and from his recommendations "in conformity with the Queen's commands, that henceforth of the 21 members of the legislative council, 7 only shall be persons holding office at the pleasure of the Crown." With respect "to the vacating of seats at the legislative council," Mr. Gladstone had only to state "that if any member of that board, placed in the position described in my predecessor's despatch of the 20th August, 1845,[2] shall not voluntarily resign his office" the lieutenant-governor would "consider it his duty to resort to the measure of suspension."

XXIII. Lt.-Governor Archibald's Conclusions from Lord Stanley's Despatch as to the Life Tenure of a Legislative Councillor.

I have dwelt at length on this despatch of Lord Stanley of the 20th August, 1845, because of the importance given to it by Lieutenant-Governor Archibald in 1883, when he laid his views with respect to the tenure of legislative councillors before the legislative council of Nova Scotia. He drew the conclusion[3] that this despatch, taken in conjunction with that of Mr. Gladstone, "enlarged the tenure of a seat of a legislative councillor from being one of pleasure to that of life, subject only to be defeated by the occurrence of one of the events specified in the despatch and resolutions." "This matter," he added, "was much in the nature of a compact between the Crown and the council, and the faith of the Crown was finally pledged to the enlarged tenure." Governor Archibald, in coming to the conclusion, was largely influenced by the action which was taken in New Brunswick and on which Lord Stanley dwelt as form-

[1] See Nova Scotia Leg. Jour., 1847, App. 4, p. 15.
[2] See *above*, paragraphs xix., xx.
[3] See Leg. C. Jour., 1883, pp. 104-111.

ing a precedent for a change in the constitution of the legislative council of Nova Scotia. Governor Archibald did not ignore the fact that the conclusion to which he had come was apparently contradicted by the fact that in several commissions and instructions issued to governors of Nova Scotia, subsequent to the despatches in question, all appointments to the council continued to be made "during pleasure." He meets this objection—vital on the face of it—by the following statement:

"It would have seemed the proper thing to revise the terms of the royal commission and instructions, so as to have made them conformable to the altered tenure, and this is the course which first suggested itself to the colonial secretary, as appears by his despatch of the 11th July, 1843, to Sir William Colebrooke, quoted above. But on further consideration Lord Stanley informed Sir W. Colebrooke, in another and later despatch[1] of the 30th December, 1843, that, on proceeding to execute his intention in the form announced in the previous despatch, it had been gratifying to him to discover that it would be practicable to fulfil the pledges contained therein, without incurring the inconvenience of introducing any change in the royal commission and standing instructions under which he was acting." So that it would appear "the life tenure had been introduced in the most solemn form into the constitution of the council in New Brunswick, without changing the wording of the royal commissions or instructions. *If that were the case there* [*in New Brunswick*] *there can be no reason why it should not be so here* [*in Nova Scotia*]."[2]

XXIV. Review of the Changes in New Brunswick Constitution.

As Governor Archibald appears to have fallen into an error in the foregoing statement it is important that we should now review the facts in New Brunswick, though I shall show at the close of this review, when I come to give my conclusions on the facts, that this error, too, does not impair the general argument of the lieutenant-governor in the opinion he formed on Lord Stanley's despatch.

XXV. Address of New Brunswick Assembly with Respect to Legislative Council of that Province.

Now it appears from the journals[3] of the house of assembly of New Brunswick that in the session of 1843, that body passed an address to the Queen, praying that such changes should be made in the constitution of the legislative council as would make it "so free from official influences as to form a constitutional check as well as upon the executive, as the representative branch of the legislature." They proposed for Her

[1] See *above*, p. 150.

[2] The italics and words in brackets are mine.

[3] See N.B. Ass. Jour., 1843, pp. 288-289.

Majesty's consideration "that each member of the council should be seized of a certain amount of unencumbered real estate; and that the seats of members should be vacated on their ceasing to be possessed of a substantial qualification, or on their becoming bankrupt, executing a composition deed, becoming a public defaulter, or neglecting to give their attendance for a given time, without leave of the lieutenant-governor." The assembly dwelt on the fact that of the eighteen members that then composed the council, "a great proportion held offices at pleasure under the Crown, and the principal officers of the government generally form a majority of the members present;" and that it was not possible that "a body so constituted can be supposed to legislate with the independence necessary to secure public confidence in their acts." In the first settlement of the province, "it was necessary, from the paucity of qualified men, to appoint the principal officers of the provincial government to seats in the legislative council," but as such necessity had ceased to exist, the assembly "humbly conceive that a more constitutional system should be established and that, so far as regards public officers, they should never exceed the number necessary to conduct the business of the government in that house." In conclusion, the address implores Her Majesty "either by the exercise of the royal prerogative, or otherwise, to establish such salutary provisions for the future, as may effectually secure the independence of that body."

XXVI. Answer of Lord Stanley to Address of Legislative Council of New Brunswick.

It will be seen that in this address there is no reference to a life tenure, and consequently there is no mention of that subject in the despatch of Lord Stanley of the 11th of July, 1843, in answer to that address. Certain changes were, however, made in accordance with the suggestion of the assembly, as was pointed out in the despatch of Lord Stanley to Lord Falkland in August, 1845—the most important being the limitation of office holders with seats in the council.[1]

XXVII. Lord Stanley's Precise Statement of Changes in New Brunswick Constitution.

In a later despatch of the 30th December, 1843, Lord Stanley proceeds to show the nature of the changes in the constitution of New Brunswick, and the reasons why it was not necessary to change the commission and instructions. I draw special attention to his language as it is obvious that Lieutenant-Governor Archibald did not fully appreciate its significance.

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[1] See *above*, p. 150.

"On proceeding to execute the intention which I had thus announced, aided by your two last mentioned despatches, it has been gratifying to me to discover that it will be practicable to fulfil the pledges contained in my despatch of the 11th of July, without incurring the inconvenience of introducing any change in the royal commission and standing instructions, under which you are acting.

1. "The first change to be made is that of increasing, from fifteen to twenty-one, the total number of the members of the legislative council. In exercise of the power reserved to Her Majesty by the royal commission, the Queen has partially effected this alteration, by issuing, under the royal sign manual, the four accompanying warrants for the appointment of four of the additional councillors.

2. "The rule, that of the twenty-one members of the legislative council, seven only should be persons holding office at the pleasure of the Crown, being a rule in restraint of the royal prerogative, and obligatory to the Crown itself, is as fully established, and is as binding when laid down in Her Majesty's name, in pursuance of the commands which the Queen has been pleased to lay on me for that purpose, as if it were incorporated in the royal instructions.

3. "That the quorum should be fixed at eight, is a rule, the repetition of which would be superfluous, as it is already to be found in the royal commission.

4. "As the commission already authorizes you, on sufficient cause, to suspend any member of the legislative council, and as they all hold their offices at the Queen's pleasure, the principle that every seat shall be vacated on proof that the holder has become bankrupt or insolvent, or a public defaulter, or guilty of any infamous crime, is a rule which, without any change in that commission, may be effectually established. If any such case should arise, you will immediately exercise the power of suspension already vested in you, nor will the Queen hesitate to confirm any such suspension, by the final removal of the person affected by it, if the fact on which your original order may proceed, shall be substantiated.

5. "The last change contemplated in my despatch of the 11th of July, regards the effect of the unauthorized or protracted absence of members of the legislative council. On referring to your present instructions, you will however see that all that is necessary for securing this object is close adherence to the provisions of them.

"Whenever a change in the office of governor-general may render indispensable the issuing of a new commission and instructions, care will be taken that they should be framed in strict accordance with the views and intentions explained in my present despatch, and in that of the 11th of July. In the meantime you will find that there is nothing in the existing commission and instructions which could in any degree obstruct or interfere with the complete fulfilment of Her Majesty's gracious

purpose. For the more complete elucidation of them, you will communicate this despatch, and my despatch of the 11th of July, to both houses of the provincial legislature, in compliance with my address for the production of them which they may present you."

XXVII. Inference to be Drawn from Foregoing Despatch.

It will be seen, therefore, that in the foregoing despatch there is no reference to a life tenure, but only to the specific changes to which the imperial government had agreed, and which did not necessarily involve any alteration of the commission and instructions of the governor. This despatch, indeed, by its specific character, effectually disposes of Governor Archibald's supposition that there was a reference to a change to life tenure in the intimation by Lord Stanley that no changes need be made in the commission and instructions.

XXIX. Request of Legislative Council of New Brunswick for a more Permanent Tenure after Receipt of Despatches in Question.

But we have more evidence bearing on this question of a supposed life tenure of legislative councillors in New Brunswick. In the session of 1844, the legislative council of the province went into committee of the whole on Lord Stanley's despatches of the 11th July and 30th December, 1843, mentioned above, and came to the following resolutions:

"Deeply impressed with the opinion that the happiness and welfare of Your Majesty's Loyal and Faithful Subjects, the People of New Brunswick, can only be maintained by securing to them the mixed form of government which has placed Your Majesty's Kingdom foremost among the nations of the civilized world, we would respectfully solicit Your Majesty's gracious consideration to the present position of the legislative council, as one branch of the provincial legislature, and humbly submit that it should be established upon a more permanent basis, and in closer analogy to the second branch of the imperial parliament.

"Your Majesty will readily perceive that for a legislative body to hold office merely during pleasure, has a tendency to expose them not only to undue influence of the popular branch of the legislature, whenever that branch happens to be dissatisfied with their proceedings; and although in times of comparative tranquillity such influence may be rarely exerted, in cases of emergency, when vital questions are under discussion, the independence of the council intended as a great constitutional check to the other two branches, may be placed in peril, and the great object for which that middle branch was called into existence will either be fettered or rendered inefficient.

"We beg humbly to represent that the weight and influence of the legislative council as an independent branch of the legislature, mainly depend upon its character for stability in the eyes of the country, and that it would be highly desirable that the tenure of office of the members of the legislative council should be during good behaviour, and should also be subject to the same disqualifications and mode of vacating the seats of the members by reason thereof, as are prescribed for the legislative council of Canada by the imperial parliament.

"We therefore earnestly implore Your Majesty's benign and favourable consideration of the subject, and that Your Majesty will be graciously pleased to adopt such measures as will secure to this branch of the legislature those rights and privileges, so essential to the perfection of the colonial constitution of Your Majesty's loyal province of New Brunswick."

XXX. Answer of Lord Stanley Refusing the Change Suggested, Life Tenure or Good Behaviour.

In this address, the prayer was for a tenure during good behaviour, or in other words, constitutionally for life,[1] as in the cases of judges in England and in all dependencies of the Crown. In his reply of the 23rd of August, 1844, Lord Stanley says:

"I have laid before the Queen the address of the members of the legislative council of New Brunswick, (inclosed in your despatch of the 16th of last April,) recommending that their tenure of office should be during good behaviour; and that they should be subject to the same disqualifications and mode of vacating their seats as have been prescribed for the legislative council of Canada by the imperial parliament.

"Having maturely weighed this address, and the despatches noted in the margin, which you have addressed to me in reference to it, I have to acquaint you that the grounds for effecting such a change in the constitution of this branch of the legislature, as is desired, have not appeared to me to be sufficient to justify me in advising the Queen to accede to the wishes of the legislative council.

"I have accordingly to instruct you to inform the legislative council of New Brunswick, that though Her Majesty was pleased to receive their address very graciously, Her Majesty has not given me any commands in respect to it."

XXXI. Inference to be Drawn from the History of New Brunswick in this Case.

This summary of the history of the changes in the constitution of the legislative council of New Brunswick in 1843-4 makes it quite clear

[1] "Appointments made during good behaviour create a life interest in the office, unless specifically made for a term of years." Anson's "Law and Custom of the Constitution," II., 204.

that Lieutenant-Governor Archibald had not accurately apprehended the case, and that the positive conclusions he drew with respect to the meaning of Lord Stanley's despatch of the 20th August, 1845, as to the constitution of the legislative council of Nova Scotia were not justified by the facts in the former province. The two facts stand out clearly:

1. That the remarks made by Lord Stanley,[1] that it was not necessary to make any changes in the royal commission and instructions in fulfilment of the pledges contained in his despatch of 11th July, 1843, referred to certain changes which he explained specifically in a later despatch[2] of the 30th December, 1843, and not to a change of life tenure.

2. That it does not appear by these despatches, as assumed by Lieutenant-Governor Archibald[3] in 1883, that "the life tenure had been introduced in the most solemn form into the constitution of the council of New Brunswick," but if there were any doubt on this point it is effectually dispelled by reference to the later despatch[4] of Lord Stanley of the 23rd August, 1844, in answer to the address of the legislative council, asking for a tenure during good behaviour.

Governor Archibald's mistake (of which much was made by correspondents in the press during the controversy on the subject) was clearly in dwelling too strongly on the action in New Brunswick, as if it were conclusive as to the facts at issue in Nova Scotia; whereas the course pursued in the former province had been simply mentioned by Lord Stanley, in my opinion, as a precedent for changes in Nova Scotia, and not as showing all that was to be done in that province, but I shall refer fully to this point at a later stage of this argument, and shall not now break the continuity of this historical narrative, which is necessarily precedent to the conclusions I have come to on the question at issue.

XXXII. Legislative Councillors hold during Pleasure by Governor's Commissions Subsequent to 1846.

When we come to consult the commissions and instructions that were issued to governors-general under the royal sign manual and signet, subsequent to Lord Stanley's despatch, which, in Lieutenant-Governor Archibald's opinion, made so important a change in the constitution of Nova Scotia, we find that each and all made the appointments during pleasure and provided for a general power of suspension as in all previous commissions and instructions for a century and a half. In the Earl of Cathcart's commission and instructions, issued on March 16th, 1846, it is specially provided that the number of members of the legislative council shall not exceed twenty-one in all and no other change was made in these

[1] See *above*, paragraph xiv.
[2] See *above*, paragraph xxvii.
[3] See *above*, paragraph xxiii.
[4] See *above*, paragraph xxx.

documents. As intimated by Mr. Gladstone[1] it was not necessary to make a change as to the number of councillors holding office at the pleasure of the Crown. The commission and instructions to the Earl of Elgin, 1848, to Sir Edmund Head in 1854, and to Lord Monck in 1861, were all to the same effect. The commission and instructions to the latter held good at the time Nova Scotia entered the union of 1867, and it is therefore useful to copy the paragraphs in these documents that refer to the council:[2]

From the Commission.

"V. And we do by these presents grant, provide and declare, that there shall be within our said province a council to be called 'The Legislative Council' of our said province, and that all and every, the powers and authorities heretofore vested in or exercised by the legislative council of our said province, shall continue to be exercised by our said council hereby re-established.

"VI. And we do hereby declare our pleasure to be that the said legislative council shall consist of such and so many members as have been or shall hereafter be from time to time for that purpose nominated and appointed by us under our sign manual and signet, or as shall be provisionally appointed by you until our will therein shall be known, all which members shall hold their places in the said council during our pleasure: Provided, nevertheless, and we do hereby declare our pleasure to be that the total number of the members of the said legislative council for the time being resident within our said province shall not at any time by any such provisional appointments be raised to a greater number in the whole than twenty-one.

"VII. And we do further direct and appoint that eight members of our said legislative council shall be a quorum for the despatch of the business thereof, and that the senior member for the time being of the said council shall preside at all the deliberations thereof.

"IX. And we do hereby give and grant unto you, so far as we lawfully may, full power and authority, upon sufficient cause to you appearing, to remove from his office, or to suspend from the exercise of the same, any person exercising any office or place within our said province or its dependencies, under or by virtue of any commission or warrant granted, or which may be granted by us, or in our name, or under our authority."

From the Instructions.

"VI. And whereas we have, by our said commission, declared our pleasure to be, that there shall be within our said province a council, to be called the legislative council of our said province, within certain

[1] See Mr. Gladstone's letter above, p. 152.

[2] See Ass. Jour. of N. S., 1848, App. 63; also *Ib.* 1859, App. 28.

powers and authorities therein mentioned, and have further declared our pleasure, to be that the said council shall consist of such and so many members as have been, or may thereafter for that purpose be, nominated and appointed by us under our royal sign manual and signet, or as should be previously appointed by you until our pleasure therein shall be known: Provided always that the total number of the members of the said legislative council resident within our said province, shall not at any time, by any such provisional appointment, be raised to a greater number in the whole than twenty-one: Now know you that we, reposing especial trust and confidence in the wisdom, prudence, and ability of the persons who are now members of the said legislative council, do, by these our instructions, re-constitute and re-appoint each and all of them to be legislative councillors for our said province during our pleasure.

"VII. And we do especially require and enjoin that whenever you shall think fit in the exercise of the authority hereby vested in you, to appoint any person or persons provisionally as aforesaid to be a member or members of our said legislative council, you do in every such case forthwith transmit to us through one of our principal secretaries of state the names and the qualifications of the several members so provisionally appointed by you to be members of our said council to the intent that the said appointments may be either confirmed or disallowed, as we shall see occasion.

"IX. And it is our will and pleasure that if any of the members of our said council, residing in our said province, shall hereafter wilfully absent themselves from the said province, and continue absent above the space of six months together, without leave from you first obtained under our hand and seal, or shall remain absent for the space of one year without leave given them under our royal signature, his or their place or places in the said council shall immediately thereupon become void; and if any of the members of our said council residing in our said province shall wilfully absent themselves hereafter from the said council when duly summoned by you, without good and sufficient cause, and shall persist in such absence, after being thereof admonished by you, you are to suspend such councillors absenting themselves, till our further pleasure be known thereon, giving immediate notice thereof to us, through one of our principal secretaries of state. And we do hereby will and require you that this our royal pleasure be signified to the several members of our said council, and that it be entered in the council books as a standing rule."

XXXIII. Cases of Bankruptcy in 1861 and 1883, and Course Followed.

In the session of 1883, the whole question of the tenure of a legislative councillor came up for consideration in the legislative council of Nova

Scotia in connection with a case of bankruptcy.[1] The committee found on investigation into the facts that one of the councillors—James S. Macdonald—was a bankrupt and reported it as in their opinion "improper that any member of this house, being an insolvent or a defaulter, should be permitted to retain or occupy a seat in the legislative council of this province unless authorized so to do by law." The matter was referred to counsel learned in the law before final action was taken on the report, and two eminent gentlemen, J. N. Ritchie and Walter Graham, Esquires, Queen's counsel, at present on the bench of the Supreme Court of the province, gave it as their opinion that Mr. Macdonald could be dismissed by the lieutenant-governor, since he, like all other members of the same body, held office "during pleasure" only. In their memorandum on the subject they referred to Lord Stanley's despatch[2] of 20th August, 1845, which they say "was a reply to a petition from the legislative council to Her Majesty, asking, among other things, that the councillors hold office during life"—a mistake as respects the petition, or, more accurately speaking, address of the council, which, as I have already shown,[3] did not ask for such a change of tenure in precise words. The counsel then go on to refer to the fact that Her Majesty was pleased to assent to the "petition," and cite the resolutions passed by the council in 1846,[4] "concurring in the necessity and propriety of the conditions attached to a concession of tenure for life to its members," as set forth in those resolutions. The learned counsel, however, while appearing to agree that a question of life tenure was under consideration in 1845-46, and the change was assented to by the despatch of 20th August, 1845, came to the conclusion, after reference to commissions issued to governors, that "it is evident that subsequent to 1846 the legislative councillors were appointed during pleasure only," and could be dismissed by the lieutenant-governor. In accordance with their recommendation the whole matter of the insolvency of Mr. Macdonald was referred to the lieutenant-governor, who subsequently gave his views at length on the tenure of the office of a legislative councillor, as I have already[5] shown above. In reply, however, to the address of the council calling his attention to a special case of insolvency, the lieutenant-governor stated that "having taken the steps which, in my judgment seemed best to carry out the desire of the council, Mr. Macdonald has forwarded to me a written resignation of his seat, and that I have duly accepted such resignation; and consequently he is no longer a member of the legislative council."[6] The course followed by Lieutenant-Governor Archibald in

[1] See Leg. Jour., 1883, pp. 10-12.
[2] See *above*, paragraphs xix., xx.
[3] See *above*, paragraph xviii.
[4] See *above*, paragraph xxi.
[5] See *above*, paragraph xxiii.
[6] Leg. Jour. 1883, p. 34.

this case was perfectly in accord with that prescribed by Lord Stanley in a similar case in 1861. In a despatch[1] to Lord Falkland, he authorized his lordship "to call on Mr. Starr, and on any other member of the executive or legislative council who may now or hereafter be in the same predicament, to resign their seats, and in the event of non-compliance, it will be your duty to suspend any such councillor from his office." In Mr. Gladstone's despatch[2] of 1848, in answer to the address of the legislative council on the subject of the tenure of office, he instructed Lord Falkland "to resort to the measure of suspension" in case a bankrupt member of the council should "not voluntarily resign his office." The office of councillor being held during pleasure under the royal instructions, the governor could always exercise the royal prerogative of dismissal in such cases as arose in 1883, when Lord Monck's commission and instructions still formed a part of the constitutional law of Nova Scotia.

XXXIV. Constitutional Effect of British North America Act, 1867.

I have now reviewed the constitutional history of the legislative council of Nova Scotia, from its origin in the early part of the eighteenth century down to the first of July, 1867, when, in accordance with the British North America Act of 1867, Nova Scotia became a province of the federal union known as the Dominion of Canada. This imperial act provides[3] that the lieutenant-governor shall be appointed by the governor-general of the Dominion; that the constitution of the executive authority of Nova Scotia "shall, subject to the provisions of this act, continue as it exists at the union, until altered under the authority of this act;" that the constitution of the legislature of the province of Nova Scotia, shall, "subject to the provisions of this act, continue as it exists at the union until altered under the authority of this act." In the ninety-second section, setting forth the subjects of exclusive provincial legislation, it is enacted that "in each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects hereinafter enumerated;" and the first subject so enumerated is "the amendment from time to time, notwithstanding anything in this act, of the constitution of the province, except as regards the office of lieutenant-governor"—the governor-general in council alone having the power to appoint, dismiss, and instruct that functionary as respects his relations with the Dominion government. In the exercise of this power of amendment, the legislature of Nova Scotia is supreme.[4]

[1] Ass. Jour. 1861, App. 48.

[2] See *above*, paragraph xxii.

[3] See B. N. A. Act, ss. 58-68-88.

[4] See Judgment of Judicial Committee of Privy Council in Hodge *vs.* the Queen. App. Cas. 117.

XXXV. Legislation Affecting the Council since 1867.

Before I proceed to state the opinions I base on the facts set forth in the foregoing constitutional review with respect to the tenure of the office of legislative councillor and the powers of the Crown in their regard at the present time, it will be convenient to complete the historical summary by reference to legislation that has passed since 1867 relative to the legislative council. In the year previous to the coming into force of the British North America Act, the house of assembly of Nova Scotia proposed an address to the Queen praying for a limitation of the number of legislative councillors to eighteen, but it was not finally concurred in by the upper house.[1] Since 1867, no legislation on the subject has been passed, and consequently the number remains at the maximum of twenty-one, as set forth in Lord Monck's commission.[2] Since 1872, an act[3] was passed providing that the "appointment of members of the legislative council of the province shall be vested in the lieutenant-governor who shall make such appointments in the Queen's name, by instrument of the great seal of the province." On the consolidation of the statutes, another section was added, providing that "any member of the legislative council, who shall be absent from his place therein for two sessions consecutively without the consent of the lieutenant-governor shall vacate his seat as such councillor"—a legal enactment, in effect, of a clause that had always appeared in the commissions and instructions of governors before confederation. In 1876 the legislature passed another act, one of the sections of which provides that "in all matters and cases not specifically provided for by this act or by any other statute of this province, the legislative council of this province, the committees and members thereof shall at any time hold, enjoy, and exercise such and the like privileges, immunities and powers as shall be for the time being enjoyed and exercised by the Senate of the Dominion of Canada, and by the respective committees and members thereof." The learned counsel who reported on the case of bankruptcy in 1883 were quite correct in stating[4] that this section "does not affect in any way the tenure of office of the legislative councillors." But it does give them, in my opinion, the right to inquire into any matter affecting the conduct or character of a member and connected with the rights, privileges, dignity and honour of the body. In inquiring into the matter of Mr. Macdonald's bankruptcy in 1883 they followed a course quite in accord with general parliamentary precedent and with the practice of the Senate itself in analogous cases affecting the dignity and constitution of the house. It was their duty to inquire into and report on the facts, and to refer them to the lieutenant-governor, who alone

[1] See Bourinot's Const. Hist., p. 99.
[2] See *above*, p. 159.
[3] See N. S. Rev. Stat. (5th ser.) c. 2.
[4] See *above*, p. 161.

could give legal effect to the finding under the constitutional power vested in him as the representative of the Crown. Lieutenant-Governor Archibald appeared to think that "the council in the case referred to might and perhaps ought to have made the declaration of vacancy which naturally followed the finding of the facts." No such power as vacating a seat, however, has ever been given to the council, even supposing Lieutenant-Governor Archibald's interpretation of Lord Stanley's despatch of August 20th, 1845, to be correct; the Crown reserved to itself alone the right to suspend or dismiss, as Mr. Gladstone's and Lord Stanley's despatches, as well as the commissions and instructions of the governors, show beyond dispute.[1]

XXXVI. Conclusion: Principles deduced from Historical Review.

Having brought this historical review down to the latest date, I can now proceed to state the opinions I have formed from the commissions and instructions to different governors that specially relate to the legislative council. One thing is clear, that from 1719 to 1861—from Governor Phillips until Governor-General Monck, whose commission and instructions held good until 1867—the legislative councillors, as well as executive councillors, held office during the pleasure of the Crown. But while this is no doubt the strictly legal and technical interpretation to be given to the commission and instructions, it is necessary to consider that the constitution of England and of all her dependencies is largely governed by conventions, understandings and usages which may not be law in an exact technical sense, but which, nevertheless, have the force of law in the operation of the system we possess. In coming to any conclusion with respect to the tenure of office of legislative councillor, these usages and understandings must have weight, and, therefore, I shall endeavour to deduce the principles that seem well established.

From 1719 until 1867 there were three well defined periods in the constitutional history of the province.

1. From 1719 until 1758, when the governor and council, with executive and legislative powers, alone carried on the government.

2. From 1758 until 1838, when the government was in the hands of a governor, a council with legislative and executive functions, and assembly elected by the people.

3. From 1838 until 1867, when the government was entrusted to a governor, an executive council, a legislative council, an assembly, and the province obtained the concession of responsible government.

During the first and second epochs or periods, when the council had both legislative and executive functions, and the government was controlled by

[1] See *above*, paragraph xxxii.

the governors under instructions from the imperial government, the Crown imposed limitations on the powers of the governors with respect to its council. Suspension or dismissal could not be arbitrary or without cause. In all cases the Crown required a report of reasons of suspension or dismissal. In Governor Durham's instructions, as late as 1838, as well as in Governor Wilmot's, as early as 1764, it is ordered that the governor is "neither to augment nor diminish the number of our said council as it is at present established, nor to suspend any of the members thereof without good and sufficient cause, nor without the consent of the majority of our said council."[1] In a special case of suspension, where the reasons could not be communicated to the council, those reasons also should be laid before the Crown for its approval or disapproval. These are limitations of the power of the governor to prevent arbitrary and unjust dismissals. A high authority,[2] writing in 1783 of the constitutions of the American colonies, states the rule in these words: "Every member of the council is appointed during His Majesty's pleasure only; and, with the consent of the council, may be suspended by the governor for misbehaviour." We find no examples during these periods of wholesale dismissals or suspensions, but the Crown appears to have treated the office as one practically during good behaviour. The power of suspension or dismissal was in reserve, but only exercised for good and sufficient cause—misconduct, misbehaviour, or non-attendance on duties. The latter cause was a disqualification in all cases, from 1719 until the present time. The Crown, as in the case of all public servants holding office during pleasure, give value and importance to the office by giving it by custom a certain stability. In Lord John Russell's famous despatch of October, 1839,[3] which led the way to responsible government, since it laid down the principle that various political offices should be vacated on certain political conditions, we find it expressly laid down: "I cannot learn that during the present or the two last reigns a single instance has occurred of a change in the subordinate or colonial officers, except in case of death or resignation, incapacity or misconduct." Thus, he went on to say, the system had grown up "of converting a tenure at pleasure into a tenure for life." Thereafter, however, he points out, "the tenure of colonial offices held during Her Majesty's pleasure will not be regarded as equivalent to a tenure during good behaviour" in the case of officers whose duties involve the "character and policy of the government." He refers especially to the executive council, "especially in those colonies in which the legislative and executive councils are distinct bodies." In other words, he distinguished the legislative from the executive council as con-

[1] See *above*, paragraph xi.
[2] Stokes's "Const. of Brit. Colonies in N. A.," p. 241.
[3] See Can. Sess. Papers, 1883, No. 70; Bourinot's Const. Hist., p. 38.

stituted in Nova Scotia since 1838.[1] It is impossible to suppose that he could do otherwise than make a distinction between political officers and members of a legislative body forming a branch of the legislature. Be that as it may, the rule that was applied to public officers appears to have also applied to legislative councillors, so far as I can find data on the subject. While the Crown controlled the legislative council, it certainly did not ever act with respect to it in a capricious manner but appears to have given it every possible guarantee that it should exercise its legislative powers free from any fear that its members would be summarily and unjustly dismissed.

Now we come to the third period of Nova Scotia's constitutional history, during which the province obtained from the Crown large rights of self-government—when the Crown no longer interfered in matters of purely local or internal concern, and the executive councillors became immediately responsible to the assembly and only held office as long as they retained the confidence of the people and their representatives in the legislature. The Crown, it will be seen, never yielded by so many words in any legal instrument its prerogative of appointing councillors during pleasure, and its incidental right of suspending or dismissing them. That was a prerogative always in reserve, but limited by usage to cases of positive misconduct. Mills, in his "Colonial Constitution," states,[2] "that the members of the legislative council may be suspended by the governor for misconduct." We find cases of resignation during this period, one for bankruptcy as a disqualifying cause, but none of arbitrary dismissal for political or other insufficient reasons.

But while this was the case so far as the evidence before us goes, there had grown up a sentiment in the maritime provinces, with the desire for responsible and self-government, that legislative councils should have such guarantees of stability as had been given by statute to the members of the councils in Canada. This sentiment obtained expression in an address of the Nova Scotia council to the imperial government in 1845, of which I have already given the exact terms,[3] and a short history of all the subsequent proceedings. It does not appear that any complaint was made in the debate—and certainly not in the address—that the Crown had abused its powers by dismissals or by the arbitrary exercise of its prerogative right. The address, as I have shown, did not in distinct words ask for life tenure, but for other changes. It is to be regretted that we have not before us the text of Lord Falkland's despatch forwarding the address but we may fairly assume, from the tenure of Lord Stanley's reply to the council, that the governor referred to the system in Canada as a basis for a change in the constitution of

[1] See *above*, paragraph xvi.
[2] Citing Clark's "Colonial Law," p. 31.
[3] See *above*, paragraph xviii.

Nova Scotia. Though the council did not in their address ask for a life tenure but for "a defined constitution," it is clear that Lord Stanley's despatch[1] of the 20th August, 1845, on which so much weight was properly given by Lieutenant-Governor Archibald in 1883, did discuss the address from the point of view of a life tenure, and did by the command of the Queen make certain changes in the constitution of the council, the exact significance of which it is all important to ascertain for the purposes of this inquiry. Lieutenant-Governor Archibald's conclusions[2] on the subject were very strongly expressed, and those who differ from him have dwelt on the fact that he attached great weight to the action in New Brunswick with respect to its legislative council, and had fallen into an error in assuming that the question of life tenure had been discussed and conceded in that province. But the fact that he fell into an error in this particular does not take from the importance that he attached to Lord Stanley's letter to Lord Falkland. That despatch must be considered by itself on its own merits. Any one who reads it[3] judicially will see beyond doubt that he was discussing the question of life tenure; that he was not opposed to it, while not giving in his adhesion to the argument adduced by Lord Falkland (presumably) with respect to Canada; that he followed up this expression of his view of the subject by referring to the action that had been previously taken in New Brunswick, as affording a basis of action in Nova Scotia; that the changes proposed—it is not necessary to repeat[4] them here—"would tend to elevate the character and to increase the legitimate authority and influence of the legislative council, and thus give additional stability to the provincial constitution." Then, having set forth what had been done in New Brunswick, he uses the very explicit and significant language: "*We think that the same or similar rules ought to be introduced in Nova Scotia, as a necessary accompaniment of the proposed alteration in the tenure of the office of a legislative councillor;*" and "on these terms," he added, "Her Majesty would be prepared to accede to the suggested change in that tenure." It is impossible, in the opinion of the writer, to come to any other conclusion than that this language means unequivocally that practically a life tenure was to be granted by Her Majesty's command, subject to the rules laid down with respect to disqualification by bankruptcy, crime, and non-attendance, and to the number of men holding offices under the Crown and sitting in the council. Unless we adopt this interpretation the whole tenor of the despatch and the significant language I have just quoted are meaningless. The fact that the

[1] See *above*, paragraph xix.
[2] See *above*, paragraph xxiii.
[3] See *above*, paragraphs xix, xx.
[4] See *above*, paragraph xxvii.

council accepted the terms[1] in clear emphatic language in an address to the Crown—"that this house concurs in the necessity and propriety of the conditions attached to the concession of a tenure for life to its members"—shows the construction placed on the despatch by the council at the time. The terms were accepted, and the compact between the Crown and the council was to all intents and purposes settled. Mr. Gladstone, on behalf of the Crown, took no exception to this emphatic declaration of the council, but tacitly acquiesced in what had been done previously with the authority of the Crown. If there had been no such compact, assuredly he would have made some reference to the language of the council, accepting the terms as accompanying a change of tenure, instead of going on to make some remarks on other points that occurred to him in connection with the address. It is true no changes were made in the future commissions and instructions with respect to a life tenure or to the rules specifically stated by Lord Stanley to be "a necessary accompaniment of the proposed alteration in the tenure of the office of a legislative councillor," and no doubt, from a strictly technical legal point of view, the proposed change may be regarded by lawyers, who do not consider all the constitutional aspects of the case, as defective. But Lord Stanley has explained[2] why it was not necessary to make all these changes in the commission and instructions as in the case of New Brunswick and Nova Scotia; and with respect to the "proposed alteration in the tenure of the office of a legislative councillor," to which the other changes or rules were a mere accompaniment, he says in distinct language that it was not necessary that this "innovation"—mark this word—"should be made by the authority of parliament;" he was not aware of any reason "for doubting the power of the Queen to effect the change *permanently*, in the *unaided exercise* of Her Majesty's royal prerogative." In other words, the Queen, by a compact made in this despatch written by her command by the secretary of state and responsible councillor, pledged herself to allow the royal prerogative to remain in abeyance with respect to the legislative council of Nova Scotia, and to permit its members to hold office practically during good behaviour—the terms accompanying and limiting this new tenure being set forth clearly in Lord Stanley's despatch.

Too much importance may be attached to the commissions and instructions of governors, and too little to the despatches to the same instructing them as to their duties and responsibilities. The instructions that accompany the commissions are not under the great seal, with all the legal weight that attaches to documents to which that highest evidence of the royal will is affixed. The governors' commissions and instructions in Nova Scotia, as in other colonies, have been always under the signet

[1] See *above*, paragraph xxi.

[2] See *above*, p. 155.

and sign manual. The instructions, in which the clauses respecting the tenure of councillors generally appeared, were never more then royal directions as to the manner in which the powers of the government were to be performed. They could not confer powers of themselves but were, as they were styled, "instructions" how to carry out the legal powers of governors.[1] A despatch giving the commands of the Sovereign, signed by a responsible minister, would have just as much weight with a governor and he would be just as much constitutionally bound to obey them as if they were "instructions" accompanying the commission. I draw special attention to the fact that it was correctly laid down by Lord Stanley in 1843,[2] that any rule "in restraint of the royal prerogative, and obligatory on the Crown itself, *is as fully established and is as binding when laid down in her majesty's name, in pursuance of the commands which the Queen has been pleased to lay on me for that purpose, as if it were incorporated in the royal instructions.*" The constitution of Nova Scotia and the provinces has been largely moulded by despatches. The whole system of responsible government which regulates the relations of the Crown and the ministry with parliament, and, in fact, has placed the prerogative in abeyance in important particulars, originated in such despatches as that of Lord Stanley on the 20th August, 1845. In no statute, passed with the consent of the Crown, is there an enactment that the royal prerogative to choose its ministers is to be guided by the fact that ministers can only be chosen when they have the confidence of the popular house, and that they must resign when they do not possess it.[3] Where is there legal authority for limiting the royal prerogative with respect to public officers who hold office during pleasure? On this point it is well observed by a high authority:[4] "It would be perfectly legal, though neither just or politic, for an incoming minister to obtain from the Crown as a proof of confidence the dismissal of every civil servant who holds his office during pleasure."

Another high authority[5] has truly said with respect to "what the Queen might do without consulting parliament," simply by the exercise of prerogative rights which have never been expressly legislated away: "Not to mention other things she could disband the army (by law she cannot engage more than a certain number of men, but she is not obliged to engage any men); she could dismiss all the officers, from the general commander-in-chief downwards; she could dismiss all the sailors, too; she could sell off all our ships of war and all our naval stores; she could

[1] See Baron Maseres's "Can. Freeholder," vol. ii., p. 225. He was Attorney-General of Canada.

[2] See *above*, paragraph, xxvii., p. 155.

[3] See Todd's "Parl. Govt. in the Colonies," 2nd ed., p. 74; Bourinot's "Cons. Hist.," p. 39.

[4] Anson's "Law of the Constitution," ii., p. 263.

[5] See Dicey's "Law of the Constitution" p. 390, citing Bagehot.

make a peace by the sacrifice of Cornwall, and begin a war for the conquest of Brittany. She could make every citizen in the United Kingdom, male or female, a peer; she could make every parish in the United Kingdom a 'university'; she could dismiss most of the civil servants; she could pardon all offenders. In a word, the Queen could by prerogative upset all the action of civil government within the government, could disgrace the nation by a bad war or peace, and could, by disbanding our forces, whether land or sea, leave us defenceless against foreign nations."

But by conventions, understandings and usages that have grown up with parliamentary government since the Revolution, the sovereign's prerogatives in these and other respects have been limited, qualified and even annulled in practice. In the same way the Crown's prerogative in the government of the Canadian provinces has within a half century been modified and even annulled by the action of the principles of responsible government. All these conventions, understandings and usages might not be cited in a court of law, but they have just as much force in the operation of our political system as a statutory enactment, and are respected and carried out by the Crown and the political cabinet or executive. Applying these well understood and commonly accepted principles to the question now immediately before us, we can well understand the argument that the exercise of the prerogative of the Crown with respect to the legislative council is now regulated by an understanding, laid down in the first place in distinct language in the despatch of the 20th August, 1845, under the express command of the Sovereign. The whole system of responsible government does not rest on a more legal or secure basis. The commission and instructions to Lord Monck do not disturb that basis. On the contrary, the modifications that therein appear, and the very general tenor of the clause with respect to suspension of persons appointed during pleasure, go to show the desire of the Crown to leave all questions affecting the self-government of the province to be regulated by law and usage under the new conditions of responsible government. The governor-in-council had large powers with respect to internal administration under the old regime of an irresponsible executive, and a governor constantly acting under special instructions from the imperial authorities. Constitutionally the instructions contained ... the despatch of the 20th August were always in force until repealed by other instructions. Briefly summed up, the constitution of Nova Scotia in this particular was in 1867 as follows, in my opinion:

(*a*) The legislative council formed a nominated or upper house of a legislative body, the other branches of which were a lieutenant-governor, representing the Crown, and an assembly representing directly the people.

(*b*) The council formed part of a system of legislative and constitutional government sanctioned by the Sovereign in 1758. This house had

legislative functions co-ordinate with those of the assembly except as respects bills of revenue, expenditure and taxation, which it could not initiate or amend though it might reject them.

(*c*) That in granting that constitution, and in conceding legislative rights to the people in 1758, the Sovereign gave up his rights to legislate directly by prerogative, and the Crown in parliament, as the supreme legislative authority of the Empire, could alone legislate for the province as for other dependencies of the Empire, in matters of imperial concern and necessity.

(*d*) That the rights of legislation conceded to Nova Scotia were given to three branches, and not to one alone, and that the legislative council as a whole had absolute rights and responsibilities as a part of the legislative framework, and its place in that structure should not be disturbed by any arbitrary exercise of the royal prerogative. It is a question whether at any time after 1758 the Crown could constitutionally legislate it away as a whole body by the mere exercise of the royal prerogative, though it might increase and limit its membership and regulate the tenure of office, since a total abolition would seem to be an infringement of the constitution conceded to Canada in 1758. The Crown in parliament could alone suspend or legislate away the constitution of the province, after the Crown had once conceded the right of legislation and self-government by three branches, as was done in the case of Lower Canada in 1838 and proposed by Lord Melbourne in the case of Jamaica in 1839.

(*e*) That while the Crown had not given up its theoretical right to appoint members of the council only during pleasure, it had by agreement and usage for many years previous to 1867 practically yielded its right, and conceded a tenure for life, subject to certain rules and conditions as set forth in the despatch of 20th August, 1845.

(*f*) That consequently, in the opinion of the writer, the constitution of the council up to 1867 was unalterable except by the authority of the Crown in parliament, and its individual members were subject to certain conditions accompanying a tenure during good behaviour for life.

(*g*) That since 1867 the constitution of the council remains as just set forth, subject to such amendments and alterations as have been made by the statutory authority vested by the British North America Act of 1867 in the legislature of the province.

(*h*) That the lieutenant-governor of the province, as representing the Crown, may suspend or dismiss a legislative councillor, who falls within the conditions of the despatch[1] of August 20th, 1845, but he has no power to interfere with the constitution of the legislative council as a whole, or by the cancelling of the commissions and consequent dismissal of members, one by one, to abolish the body, as that would be

[1] See *above*, paragraphs xix., xx.

clearly an illegal and unconstitutional act, in view of the fact that the British North America Act gives power over the constitution to the legislative authority alone.

(*i*) That by the British North America Act of 1867 the legislature of Nova Scotia—*i. e.*, its three branches conjointly—can alone by statute abolish the legislative council as a branch of this legislative authority, and the Crown in the imperial parliament could not legislate in this direction except by a repeal of the clause in the union act of 1867, giving the provincial legislature the power to amend the provincial constitution except as respects the office of lieutenant-governor. In 1879 the council rejected a measure passed by the assembly for the abolition of the upper house, and the assembly subsequently passed an address to the Queen, praying that the imperial parliament might pass an act empowering the lieutenant-governor to increase the number of legislative councillors so that the measure in question might be passed. The secretary of state for the colonies, in refusing the prayer of the address, called special attention to the fact that under sections 88 and 92 of the British North America Act of 1867 "the power of amending the constitution of the province has been vested in the provincial legislature, and 'the circumstances,' as placed before him did not lead him to conclude that 'an alteration of the constitution has been proved to be necessary.'"[1] Undoubtedly the Crown in council and Crown in parliament have, by the terms of the British North America Act, delegated all powers they had previous to 1867 to the legislature of Nova Scotia with respect to the amendment of the constitution. The Crown now possesses only such rights as it possessed previous to the passage of the British North America Act, but these are subject to amendment with respect to the tenure of office of legislative councillor, and the continuance of the council as a branch of the legislature. The parliament of Great Britain can now only intervene under conditions of provincial incapacity to discharge its legislative functions under the British North America Act, and the circumstances would have to be very exceptional and extraordinary that would entitle the provincial legislature to imperil intervention in a matter exclusively placed under its legislative jurisdiction as a matter immediately connected with the internal affairs of a self-governing province.

I need only say in conclusion, it will be seen by my readers, that in treating this grave constitutional question, I have taken into consideration not simply its purely legal aspect, but also necessarily all those principles, maxims and usages which enter into the working of the constitutional system of England and all her self-governing dependencies, which play

[1] See also a later despatch of the Marquis of Ripon, 3rd December, 1894, in which he states that Her Majesty's government "consider that as the province has the power to alter its constitution, if it sees fit to do so, a resort to imperial legislation would be inexpedient except in circumstances of urgent necessity"

as important a part in the operation of the constitutional machinery as any statutes, which give at once flexibility and stability to the framework and enable it to work as a rule with remarkable effectiveness, and which cannot be rudely touched and broken without doing undeniable injury to the whole fabric of government in the Dominion and its provinces.